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No. 96-1291

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DOLORES M. OUBRE,
Petitioner,

v.

ENTERGY OPERATIONS, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONER

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STATEMENT OF THE CASE

AARP adopts the Petitioner's statement.

INTEREST OF AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 30 million

* AARP's brief has not been approved or financed by petitioner or her counsel or any other party.

persons age 50 or older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's members are employed individuals, many of whom are protected by the Age Discrimination in Employment Act, (ADEA), 29 U.S.C. § 621 *et seq.* (1994).

One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and to retain older workers, and to help older workers overcome the obstacles they encounter because of age. Since 1985, as part of its advocacy efforts, AARP has filed more than 150 *amicus curiae* briefs in the federal district and appellate courts and in the U.S. Supreme Court regarding the proper interpretation and application of the ADEA. In this Court, AARP has participated as *amicus curiae* in, among others, the cases of *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); and *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996).

AARP's concern in this case is that the courts not strip older workers of carefully crafted statutory protections at the time they are the most vulnerable to employer overreaching. If ratification and tender back principles override the Older Workers Benefit Protection Act (OWBPA), Pub. L. 101-433, 104 Stat. 978, 983 (1990), employers will have no incentive to follow the requirements Congress deemed necessary to prevent employer overreaching.

For these reasons, AARP submits its brief *amicus curiae.*

SUMMARY OF THE ARGUMENT

Congress affirmatively abrogated the common law principles of ratification and tender back when it enacted Title II of the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978, 983 (1990). The OWBPA was enacted to prevent employers from unfairly obtaining waivers

from employees who were unaware of their rights under the ADEA and who lacked the knowledge to ascertain whether they had a potential claim under the ADEA. To address this problem, Congress created detailed statutory requirements that must be met for a waiver of ADEA rights or claims to be enforceable. A court cannot enforce a waiver to bar an ADEA suit if even one of the OWBPA's criteria is absent.

Moreover, even if Congress had not supplanted contract principles with the OWBPA, the *Restatement (Second) of Contracts* states that, as a matter of public policy, waivers that violate a statute, such as the OWBPA, may not be enforced. In enacting the OWPBA, Congress expressed its belief that due to the disparity in the bargaining positions of employers and employees, protecting older workers from unfair and abusive waiver practices outweighed any perceived interest in freedom of contract between them. Congress' judgment that waivers that do not comply with the OWBPA may not be enforced must be respected. Otherwise, employers will be able to thwart the express will of Congress by disregarding the OWBPA's explicit requirements knowing that they can discriminate based on age without repercussion.

Finally, ratification and tender back must not be judicially superimposed on the OWBPA because they harm the very group the OWBPA was designed to protect, older employees. Employers do not need the ratification and tender back doctrines to protect them against age discrimination lawsuits. Employers need to comply with the clear and specific requirements of the OWBPA, which provide employers with the defense they seek from age discrimination suits.

ARGUMENT

I. THE OLDER WORKERS BENEFIT PROTECTION ACT ABROGATED THE COMMON LAW PRINCIPLES OF RATIFICATION AND TENDER BACK.

The common law principles of ratification and tender back[1/] are anomalous to both the letter and spirit of the OWBPA and did not survive its enactment. Common law principles survive a statute "only upon legislative default, applying where Congress has failed expressly or impliedly to evince any intention on the issue." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991). In litigation under federal statutes, common law doctrines are appropriately applied only when the principles underlying such doctrines are consistent with the congressional intent expressed or implied in the statutes. *American Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982).

Congress was convinced that the common law did not adequately protect the rights of older workers asked to waive their rights under the ADEA:

1/ "The common law doctrine of ratification results in the enforcement of 'a promise to perform all or part of an antecedent contract of the promisor previously voidable by him.'" *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1535 n.10 (3d Cir. 1997) *citing Restatement (Second) of Contracts* § 85 (1981). The "tender back" doctrine "require[s] a refund as a prerequisite to institution of suit." *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 518 (1968).

In most cases, these two common law contract doctrines are inextricably entwined. *See Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1373 (C.D. Ill. 1991) ("States that require a tender to challenge a release sometimes use the language 'condition precedent to suit' and sometimes use the language of 'ratification.' But there is no meaningful difference between the two.").

> Even the decisions that have followed the more protective 'totality of the circumstances' approach . . . have not held that certain protective factors *must* be present . . . The instant legislation, *by contrast*, will limit unsupervised waivers to certain situations and then spell out clear and ascertainable standards to govern those situations.

S. Rep. No. 79, 101st Cong., 1st Sess. 17 (1989) (emphasis added).[2/]

In the OWBPA, Congress expressed a very specific intent to restrict the circumstances under which an employer may obtain a waiver[3/] of ADEA rights and claims. "[T]he enactment of the OWBPA changed the legal landscape" concerning waivers of ADEA rights or claims. *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534 (3d Cir. 1997).

By specifically limiting the manner in which employers may secure such waivers, "Congress has occupied this area of the law." *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994). Judicially imposing ratification and tender back onto the comprehensive statutory scheme that Congress created for waivers of ADEA rights or claims would "rewrit[e] rules that

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2/ "In enacting the OWBPA, Congress . . . rejected the applicability of common law contract principles and declined to embrace even the more demanding 'totality of the circumstances' test." *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1538 (3d Cir. 1997).

3/ AARP concurs with the *amicus curiae* brief of the National Employment Lawyers Association (NELA) that there is a significant distinction between "waivers" and "releases," despite the fact that some, including many courts, use the terms interchangeably. Brief of NELA at 6. The OWBPA regulates "waivers" of ADEA rights and claims. While a waiver may be a term within a contractual agreement, a waiver is not a contract and contractual principles should be irrelevant in determining whether or not a waiver is valid and therefore enforceable.

Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

A. The Plain Language of the OWBPA Demonstrates Congress' Clear Intent To Abrogate the Common Law of Waivers, Including The Principles of Ratification and Tender Back.

This Court has long recognized that "[i]n order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) *quoting Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). The specific question addressed by the principles of ratification and tender back is whether an employee *may waive* any right or claim under the ADEA merely by failing to return the benefits received in exchange for the waiver. Congress could not have spoken any more directly to this question when it declared that "[a]n individual *may not waive* any right or claim under this Act unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1) (emphasis added).

> [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, this first canon is also the last; 'judicial inquiry is complete.'

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981). With the language "an individual may not waive," Congress expressly divested individuals of any power to waive the OWBPA's protections or its requirements.

In addition to the explicit language in § 626(f)(1), Congress set forth a bottom line that all waivers must satisfy to be legally enforceable. Congress mandated that "a waiver

may not be considered knowing and voluntary unless at a minimum" all of the statutory requirements are met.[4/]

Because the OWBPA establishes minimum or threshold requirements, *Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368, 373 (11th Cir. 1995), absolute technical compliance with its provisions is required. The absence of even one of the OWBPA's requirements invalidates a waiver. *Collins v.*

[4/] Section 626(f)(1) of the ADEA, as added by the OWBPA, requires that a waiver of "any right or claim" contain the following:

(A) the waiver is in writing and in plain language;
(B) the waiver specifically refers to rights or claims under the ADEA;
(C) the waiver does not cover prospective rights or claims;
(D) the waiver is in exchange for valuable consideration in addition to any benefits or amounts to which the individual already is entitled;
(E) the individual is advised in writing to consult with an attorney prior to signing the agreement containing the waiver;
(F) the individual is given at least 21 days within which to consider the agreement; however, if the waiver is requested in connection with a group termination program, each individual must be given at least 45 days to consider the agreement;
(G) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, then at the outset of the 45-day period the employer must inform each eligible employee, in writing, of the class of employees who are eligible, the specific eligibility requirements, any applicable time limits on participation, the job titles and ages of all employees eligible or selected for the program, and the ages of all employees in the same job classification or organizational unit who are not eligible or selected; and
(H) the individual must be given at least 7 days to revoke the agreement after signing it.

Outboard Marine Corp., 808 F. Supp. 590, 594 (N.D. Ill. 1992) ("Under the OWBPA, a release cannot be deemed knowing and voluntary unless *all* of the technical requirements of the OWBPA have first been satisfied.") (emphasis added). *See also Soliman v. Digital Equip. Corp.*, 869 F. Supp. 65, 69 n.13 (D. Mass. 1994) ("OWBPA . . . establishes a floor, not a ceiling.").

Congress recognized a single exception to its mandate that waivers of ADEA rights and claims must satisfy all of the OWBPA's requirements to be enforceable. Congress only excused waivers "in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative," 29 U.S.C. § 626(f)(2), from meeting all of the OWBPA's requirements. Such waivers need only meet criteria (A) through (E), 29 U.S.C. § 626(f)(2)(A), and a modified version of criterion (F).[2/]

Despite Congress' clear intent to create a single exception, the Respondent would have this Court judicially engraft two others through the doctrines of ratification and tender back. Moreover, the exceptions these doctrines would add have the potential to swallow the rule established by the OWBPA. These doctrines effectively require enforcement of a waiver without any regard to whether it meets any of the OWPBA's criteria. These doctrines enforce waivers whenever an individual accepts consideration and does not tender it back prior to bringing an age discrimination lawsuit. These doctrines render the content of the waiver, and, thus, the OWBPA itself, irrelevant.

"Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus*

[2/] The individual must be provided a "reasonable," but unspecified, period of time within which to consider the settlement agreement, 29 U.S.C. § 626(f)(2)(B), as opposed to the 21-day and 45-day periods specified in §§ 626(f)(1)(F)(i) and (F)(ii) for all other waivers.

v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980), *citing Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942). Since Congress has clearly stated that the only circumstance in which a waiver need not meet all of the OWBPA's requirements is when the waiver is in settlement of a pending EEOC charge or court action, no other exceptions may be implied.

Finally, Congress spoke loudly and clearly in expressing its intent to abrogate contract principles through the OWBPA's specific provisions that supplant and exceed common law requirements concerning waivers. For example, the requirement that the waiver be in writing, 29 U.S.C. § 626(f)(1)(A), overrules decisions enforcing oral waivers. *See, e.g., Taylor v. Gordon Flesche Co.*, 793 F.2d 858, 862 (7th Cir. 1986). The requirement that the waiver be written in a manner "calculated to be understood by the average individual eligible to participate," 29 U.S.C. § 626 (f)(1)(A), overrules cases holding that if the plaintiff understood the waiver, whether anyone else would have understood it is irrelevant. *See Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1044 (6th Cir. 1986) (en banc). The requirement that waivers specifically refer to the ADEA overrules cases that enforced waivers that did not refer to the statute. *See, e.g., Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir. 1987). The provisions requiring written advice to consult with a lawyer and providing a revocation period were unheard of at common law. Because of its special concern for employees terminated in reductions in force, Congress added two additional requirements for group terminations -- the extension of the time for the employee's consideration of the waiver from 21 to 45 days and the disclosure of job titles and ages of affected employees. These requirements constitute a complete departure from the common law.

In addition, under common law, an employee challenging a waiver had the burden of showing that it was not "knowing and voluntary." *See, e.g., Harrison v. Arlington Ind. School Dist.*, 717 F. Supp. 453, 455 (N.D. Tex.), *aff'd without op.*, 891 F.2d 904 (5th Cir. 1989). The OWBPA shifts this burden to the employer. *See* 29 U.S.C. § 626(f)(3). "The requirements

established in order for releases to be 'knowing and voluntary' under the OWBPA clearly exceed the protections available under the common law." *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1539 (3d Cir. 1997).

The statutory text could not be clearer, nor could the legislative intent. Congress stated that only when each of the OWBPA's requirements is met will a waiver be considered valid and enforceable. If a waiver fails to comply with even one of these conditions, then "[n]o matter how many times parties may try to ratify such a contract, the language of the OWBPA, 'an individual may not waive,' forbids any waiver." *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994).

B. The Doctrines of Ratification and Tender Back Are At Direct Odds With the Purposes of the ADEA, As Amended by the OWBPA.

"[W]hen a statutory purpose to the contrary is evident, common law principles may not be applied." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). *See also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). The impact that common law principles would have on a federal statute's purpose and objectives determines whether they may be imposed on the statute. *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 518 (1968). *Hogue*, the only Supreme Court decision to consider a "tender back" requirement for waivers of claims under a federal remedial statute, rejected the doctrine. After determining the impact on the purpose and objectives of the Federal Employees Liability Act (FELA), 45 U.S.C. § 51 *et seq.* (1939), the Court ruled that a tender requirement would be "wholly incongruous with the general policy of the Act." 390 U.S. at 518. Ratification and tender back requirements would eviscerate the purposes of the ADEA, as amended by the OWBPA.

Congress enacted the ADEA to eliminate arbitrary age discrimination in the workplace. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); 29 U.S.C. § 621(b). The Act's objectives are to deter discrimination and to compensate

victims for injuries caused by the prohibited discrimination. *McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879, 884 (1995). The "vital element" that allows these objectives to be realized is that § 626(c) of the ADEA grants an age discrimination victim "a right of action to obtain the authorized relief." *Id.* at 884. Congress enacted the OWPBA to protect that "vital element" from overreaching employers.

The purpose of the OWBPA amendments to the ADEA is to "ensure[ ] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." S. Rep. No. 263, 101st Cong., 2d Sess. 2 (1990). Congress enacted the OWBPA to protect workers from abusive waiver practices by requiring employers to draft and seek waivers in strict compliance with the Act's provisions. The legislative history of the OWBPA makes clear that Congress did not want an older worker to be precluded from pursuing a meritorious ADEA claim unless she has knowingly and voluntarily relinquished the right to do so.

In order to protect employees' right to seek relief under the ADEA, the OWBPA restricts an employer's use of waivers as a defense to an ADEA claim. The statute requires, at a minimum, that the waiver comply with the technical requirements of the Act.[6/] Cognizant that an employer's abusive and unfair practices may result in an employee's involuntary or uninformed waiver of ADEA rights,[7/] Congress designed the OWBPA to ensure that the door to pursuing ADEA claims remains open to all but those who knowingly and voluntary choose to close it. "The objectives of the ADEA are furthered when even a single employee establishes that an

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[6/] *See* H.R. Rep. No. 664, 101st Cong., 2d Sess. 51 (1990) ("Apart from specifying that a waiver must be knowing and voluntary, the legislation provides further requirements. Although some of these requirements may be further indicia of whether a waiver is knowing or voluntary, each requirement set forth in the bill must be satisfied independent of the knowing and voluntary factor for any waiver to be lawful.").

[7/] H.R. Rep. No. 664, 101st Cong., 2d Sess. 22-23 (1990).

employer has discriminated against him or her." *McKennon* 115 S. Ct. at 885. If an employee fails to bring a claim of age discrimination because she cannot afford to tender back the consideration received for an invalid waiver, the purpose of the ADEA is frustrated: the employer is neither punished for, nor deterred from discriminating, and the elimination of discrimination is not advanced.

As numerous courts have cautioned, the principles of ratification and tender back will deter older employees from bringing age discrimination claims.[¥] These principles would have a "crippling effect" on older workers' ability to challenge waivers under the OWBPA and pursue age discrimination claims because:

> [i]n general, retired employees need all the security they can get . . . . Such workers are unlikely to be able to put their severance payments aside for future "tenders," or to be able to come up with the money to make such tender at such later time as they might acquire grounds to believe that a successful lawsuit might be mounted in connection with their retirement.

[¥] *See, e.g., Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036, 1041 (11th Cir. 1992) ("Forcing older employees to tender back their benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases based on misrepresentation or duress."); *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1270 (6th Cir. 1997) ("A tender-back requirement would deter meritorious ADEA filings."); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991) (*Hogue* rests on view that a tender requirement would deter meritorious challenges to waivers in FELA lawsuits; a tender requirement will have just as crippling an effect on ADEA challenges); *Soliman v. Digital Equip. Corp.*, 869 F. Supp. 65, 70 (D. Mass. 1994) ("To require plaintiff to tender back the benefits he has received as a precondition of going forward with his lawsuit would likely chill his prospects of prosecuting what may be a meritorious claim."); *Carr v. Armstrong Air Conditioning, Inc.*, 817 F. Supp. 54, 58 (N.D. Ohio 1993) (a tender requirement would deter meritorious challenges to waivers in ADEA claims).

Isaacs v. Caterpillar, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991).

Moreover, Congress explained the need for protective waiver provisions, stating:

> Age discrimination victims typically earn more than the minimum wage, but their average annual income is only $15,000. Moreover, once out of work, these older Americans have less than a 50/50 chance of ever finding new employment. They often have little or no savings, and may not yet be eligible for Social Security. Accordingly, it is reasonable to assume that many employees would be coerced by circumstances into accepting significant compromises.

S. Rep. No. 79, 101st Cong., 1st Sess. 9 (1989), adopted by reference in S. Rep. No. 263, 101st Cong. 2d Sess. 15 (1990); H.R. Rep. No. 664, 101st Cong., 2d Sess. 23 (1990) (citations omitted).

These economic circumstances make older workers vulnerable to coercive and abusive waiver practices and clearly affect their ability to challenge an employer's discriminatory policies or practices. If ratification and tender back are superimposed on the OWBPA, many older employees will have little choice but to let employers' discriminatory policies and practices go unchallenged and unpunished. "No matter how egregiously releases might violate the requirements of the [OWBPA], employees would be precluded from challenging them unless they somehow could come up with the money they were given when they were allegedly forced into retirement." *Isaacs v. Caterpillar*, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991). Given the likelihood that an older employee would be financially unable to return the consideration, ratification and a tender back requirement would effectively permit employers to purchase the right to ignore the mandates of the ADEA and the OWBPA altogether, without fear of repercussion.

II. WAIVERS THAT VIOLATE THE OWBPA ARE UNENFORCEABLE AS A MATTER OF PUBLIC POLICY.

Even if Congress had not abrogated the common law and "occupied this area of the law" with the OWBPA, *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994), and even if contract law applied to "waivers," the pertinent sections of the *Restatement (Second) of Contracts* demonstrate that employers whose waiver agreements violate the OWBPA may not enforce them.

"[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), *citing Restatement (Second) of Contracts* § 178(1).[9] Any interest in imposing ratification and tender back on the OWBPA clearly is outweighed by what will result if illegal waivers are enforced -- employers will have a license to discriminate based on age without repercussion, and thousands of older workers will lose their right to seek redress against unlawful discrimination.

The *Restatement (Second) of Contracts* explains why contractual terms that violate public policy may not be enforced:

> In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance. Sometimes, however,

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[9] A public policy against the enforcement of promises or other terms may be derived by the court from

> (a) legislation relevant to such a policy, or
> (b) the need to protect some aspect of the public welfare . . . .

Restatement (Second) of Contracts § 179.

> a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public policy. Such a decision is based on a reluctance to aid the promisee rather than on solicitude for the promisor as such. Two reasons lie behind this reluctance. First, a refusal to enforce the promise may be an appropriate sanction to discourage undesirable conduct, either by the parties themselves or by others. Second, enforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction.

Restatement (Second) of Contracts, Chapter 8, Unenforceability on Grounds of Public Policy, Introductory Note.

In enacting the OWBPA, Congress decided that protecting older workers from unfair and abusive waiver practices "outweighed" any interest in giving effect to employers' and employees' "freedom of contract." Refusing to enforce invalid waivers is an "appropriate sanction" to discourage employers from ignoring the OWBPA.

The Restatement identifies four factors to consider "[i]n weighing a public policy against enforcement of a term." These factors are:

> (a) the strength of that policy as manifested by legislation or judicial decisions,
> (b) the likelihood that a refusal to enforce the term will further that policy,
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
> (d) the directness of the connection between that misconduct and the term.

Restatement (Second) of Contracts § 178 (3).

These four factors command that a waiver that violates the OWBPA, which is the "term" at issue,[10/] may not be enforced as a matter of public policy.

First, the OWBPA is an exceptionally strong expression of the public policy against the "manipulation of older workers" based on their "lack of information or expertise." S. Rep. No. 79, 101st Cong., 1st Sess. 9-12 (1989).

Second, rejecting the doctrines of ratification and tender back as a means for employers to enforce their illegal waivers advances the OWPBA's policy of protecting individuals from being coerced or manipulated into waiving their ADEA rights or claims. Without these doctrines to fall back on, employers will have greater incentive to comply with the straightforward requirements of the OWBPA. All that the employer as the drafter of the waiver needs to do to obtain an enforceable waiver of ADEA rights and claims is simply to follow the statute's "cookbook" requirements.[11/] When an employer drafts a waiver in accordance with the statutory minimum standards, the legislative intent that an employee's decision to waive her ADEA rights be "knowing and voluntary" will be advanced.

Third, the OWBPA's legislative history amply documents the employer overreaching and other misconduct that prompted Congress to enact waiver legislation.[12/] Not surprisingly, there are allegations of coercion and misrepresentation in this case.

[10/] A waiver of ADEA rights or claims is usually a "term" in a separation agreement.

[11/] "Employers should not need the ratification doctrine in order to ensure that their releases are effective: they need to comply with the OWBPA." *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1543 (3d Cir. 1997).

[12/] "The House and Senate hearing records are replete with evidence of older workers who have been manipulated or coerced into waiving their rights under the ADEA." H.R. Rep. No. 221, 101st Cong., 1st Sess. 10 (1989).

Finally, a direct relationship exists between the employer's misconduct and the illegal waiver. As stated above, Congress provided employers with clear instructions for drafting a valid waiver. Employers need only follow them.

The *Restatement* not only establishes that waivers that violate the OWBPA are unenforceable on grounds of public policy, it also negates a tender back requirement. Section 197, entitled "Restitution Generally Unavailable," provides:

> Except as stated in Sections 198 and 199 [Restitution in Favor of Party who Is Excusably Ignorant or Is Not Equally in the Wrong, and Restitution Where Party Withdraws if Situation Is Contrary To Public Interest], a party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture.
>
> Comment:
>
> a. *Rationale*. In general, if a court will not, on grounds of public policy, aid a promisee by enforcing the promise, it will not aid him by granting him restitution for performance that he has rendered in return for the unenforceable promise. Neither will it aid the promisor by allowing a claim in restitution for performance that he has rendered under the unenforceable promise. *It will simply leave both parties as it finds them, even though this may result in one of them retaining a benefit that he has received as a result of the transaction.*

Restatement (Second) of Contracts § 197 (emphasis added).

In short, the common law rule as distilled by the *Restatement* is that an employer, having created a waiver which violates the OWBPA, cannot seek return (restitution) of the

consideration paid for the waiver. Nor can the employer enforce the defective waiver. Instead, the employer's remedy is a set off of the amount of consideration paid for the waiver against any judgment for the employee.[13/]

III. THE OWBPA WAS ENACTED TO PROTECT EMPLOYEES FROM OVERREACHING EMPLOYERS.

In determining whether or not the principles of ratification and tender back may be used to enforce waivers that do not comply with the OWBPA, it is critical to remember that, first and foremost, the OWBPA was enacted to protect employees from abusive and unfair waiver practices.

> The OWBPA was designed to protect employees negotiating with employers, not to protect employers from overreaching plaintiffs. Employers are, by far, in a better position to protect their own interests than are older employees.

Long, 105 F.3d at 1543. However, the principles of ratification and tender back benefit employers over employees, the intended beneficiaries of the OWBPA, in two very significant ways.

First, ratification and tender back do not return the parties to the status quo, as many employers suggest. Instead, these doctrines provide a significant windfall to employers. Consideration for a waiver agreement provides an employer with benefits that far exceed a defense against future age discrimination lawsuits. The employer is able to terminate a typically long-term, highly-paid employee and will no longer have to pay her salary and benefits. The employer is able to reduce the size of its work force, which often is one of its main

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[13/] *See Long*, 105 F.3d at 1543; *Oberg*, 11 F.3d at 684; *Fleming v. U.S. Postal Service AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995).

objectives.[14/] The amount the employer pays the employee also "typically incorporates consideration for multiple factors not challenged in an age case: waivers for other violations of law or contract, rolled-in vacation and sick time, and a public relations benefit to the employer that itself may deter other litigation." *Long*, 105 F.3d at 1544.

Although an employee receives some benefits that she might not ordinarily receive when she signs a waiver, she gives up a substantial amount in return. In addition to her right to relief under the ADEA and other statutes, the employee loses her job, her salary and continued benefits. Moreover, if the employee returns the consideration, she is "deprived of money paid to induce him to retire, yet he or she is not restored to employment; all he or she gets is the rescission of his or her release." *Isaacs v Caterpillar, Inc.*, 765 F. Supp. at 1367.

In addition, it cannot be said that an individual who is permitted to challenge age discrimination without first returning the benefits receives a "windfall." If the waiver is declared invalid and the individual prevails in the suit, the benefits the individual received can be offset against the recovery.[15/] If the waiver is upheld, the employer received what it paid for - a valid defense against the merits of the lawsuit.[16/] Finally, if the waiver is struck down and the employee loses her lawsuit on the merits, the employer may complain that it paid for a waiver that failed. However, such a complaint should not fall on sympathetic ears since it was the employer whose faulty

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[14/] "The purpose of [early retirement] programs is to induce people to retire earlier than they otherwise would have done. Such early retirement is an economic benefit to the company. To get it, the company offers the employee money for leaving early." *Isaacs v Caterpillar, Inc.*, 765 F. Supp. at 1367.

[15/] *Hogue*, 390 U.S. at 518; *Forbus*, 958 F.2d at 1041.

[16/] A waiver is no guarantee that a suit will not be filed; it simply is a defense against a suit once filed. *Isaacs v. Caterpillar*, 702 F. Supp. 711, 715 (C. D. Ill. 1988).

drafting of the waiver subjected it to suit. After all, the employer only had to comply with the OWPBA's provisions and the waiver would have done its job.

Second, permitting ratification and tender back would allow employers to discriminate based on age without repercussion. By capitalizing on older employees' economic vulnerability, employers may coerce employees into signing waivers that clearly violate the OWBPA in order to buy silence against complaints of age discrimination. Indeed, the Respondent in this case admits that its waiver does not comply with the OWBPA. Yet, it claims it is not subject to challenge for its alleged discriminatory practices. If ratification and tender back override the OWBPA, employers, like the Respondent here, will have no incentive to comply with the OWBPA's waiver provisions.

Ratification and tender back unjustly enrich employers at the expense of the older employees for whose benefit the OWBPA was enacted. Ratification and tender back encourage employers to violate the OWBPA while buying immunity from challenges to their discriminatory policies and practices. These common law principles may not be imposed on the ADEA, as amended by the OWBPA.

CONCLUSION

For the foregoing reasons, AARP respectfully submits that the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed. AARP urges this Court to rule that Congress abrogated the common law principles of ratification and tender back when it enacted the OWBPA's comprehensive and remedial rules governing waivers of ADEA rights and claims.

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June 20, 1997